

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 555 OF 2006**

Flemingo(DFS) Pvt. Ltd.,
a company incorporated
under the Companies Act,
1956, and having its
Registered Office at
D-73/1, TTC Industrial Area,
MIDC Turbhe,
Navi Mumbai, 400 705

... Petitioner

versus

1. The Board of Trustees
of the Port of Mormugao,
a body corporate set up
under the provisions of
the Major Port Trust Act,
1963, and having its
Office at Headland, Sada,
Goa, 403 804.
2. Shri Ulhas B. Phal Dessai,
Estate Officer,
Mormugao Port Trust,
Headland Sada, Goa, 403 804.
3. Midas International,
103/24/1, Foreshore Road,
Howrah, 711 102.
4. Avtaar Interiors Pvt. Ltd.,
Shop No.23/D,
Shakti Shopping Centre,
Shivaji Chowk, Opp.
Panjrapale, Chembur,
Mumbai, 400074

... Respondents

Mr. S. K. Kakodkar, Senior Advocate with Mr. Amey Kakodker, Advocate for the Petitioners.

Mr. V. B. Nadkarni, Senior Advocate with Mr. Y. V. Nadkarni, Advocate for the Respondent Nos.1 and 2.

Mr. S. G. Dessai, Senior Advocate with Mr. S. Dessai, Advocate for the Respondent No.3.

**CORAM : S. A. BOBDE &
N. A. BRITTO, JJ.**

DATE : 18TH APRIL, 2007.

ORAL ORDER

By this Petition, the Petitioner has challenged the procedure adopted by the first Respondent-The Board of Trustees of the Port of Mormugao for selecting a person for the grant of the lease of the Cruise Terminal at Berth No.10 of the Port of Mormugao. In addition, the Petitioner has sought a cancellation of the selection of the Respondent No.3 for the grant of the said lease.

2. The Respondent No.1 has stated that no decision has been taken about awarding the tender to Respondent No.3 and therefore it is clear that the second prayer is premature.

3. For considering the challenge to the procedure, the following facts are relevant. The Petitioner is an allottee of a duty free shop at the Public Users

Complex at Berth No.10 for the last one and a half years. The Petitioner has been granted a lease by the Respondent No.1 for a period of 3 years under an allotment letter dated 8-4-2004. This lease is subsisting. The Respondent No.1 hereinafter referred to as Port Trust issued an advertisement bearing the title Invitation of "Expression of Interest" to lease the Cruise Terminal Building at Berth No.10 at Major Bunder (inside dock area). On 2-3-2006 this advertisement was issued and appeared in the Navhind Times, Gomantak and Suna Parant. It also appeared on the Website of Respondent No.1 on the World Wide Web. In pursuance of the Expression of Interest which is the recent terminology used for an invitation to submit a tender, three parties expressed their interest in the lease of the area of the terminal admeasuring 1100 sq. meters and submitted their offers for operation and providing facilities at the Cruise Terminal at Berth No.10 for the passengers. The last day for submitting the Expression of Interest was 10-3-2006. The Petitioner did not do so on the ground that he was not aware of the advertisement.

4. It may be noted that before the advertisement for Expression of Interest was issued on 2-3-2006 the Respondent-Port Trust had issued an advertisement for leasing out cubicles in the Cruise Terminal Building at Berth No.10. The Petitioner had applied for cubicles for running a cafeteria, coffee shop and duty free shop. This advertisement was published in the Times of India and other local newspapers. This tender has however been discharged on 21-3-2006 by the Port Trust in pursuance of a decision purportedly taken on 21-2-2006 by the Port Trust. A copy of that decision is however not submitted.

5. The Petitioner's challenge to the advertisement process is that the Respondent-Port Trust has adopted an illegal process by giving publicity to the Invitation for Expression of Interest only in the local newspapers mentioned above. According to the Petitioner, the publicity given in the Website is of no consequence. Therefore, the advertisement is issued without any wide publicity as required by law and therefore such a procedure is illegal. It is also the Petitioner's contention that the limited publicity shows that the procedure adopted is not transparent, which is further evident from the fact that the Petitioner was not even informed personally about the issue of the advertisement for invitation for Expression of Interest when the Port Trust communicated that the earlier notice for tenders for cubicles is discharged. The above contention alone requires examination.

6. According to Mr. S. K. Kakodkar, the learned Senior Counsel for the Petitioner the advertisement inviting Expression of Interest was deliberately issued by the Respondent-Port Trust only in the local newspapers in the State of Goa and not in the Times of India. It is the contention of the learned Counsel that an earlier advertisement for inviting tenders for leasing out premises for cubicles at the same berth was issued and appeared in the Times of India and there was no reason for the Respondents to issue this advertisement only in the local newspapers. A photo copy of the earlier advertisement which appeared in the Times of India as downloaded from the Website of the Times of India is annexed at Exh.P-4.

7. Mr. V. B. Nadkarni, the learned Senior Counsel for the Respondent-Port Trust accepted the fact that the advertisement for the earlier tender was published in the Times of India and newspapers in Goa and the advertisement for the present tender was published in the three local newspapers in the State of Goa. He however explained the fact that the present advertisement is posted on the Website of the Respondent-Port Trust. He submitted that in the present case the Respondent-Port Trust followed a directive of the Central Vigilance Commission dated 18-12-2003 and published the advertisement on its Website. According to the learned Counsel, this is sufficient publicity and indeed, this method of advertisement has brought a response from a place as far as Calcutta where the other Respondents saw the advertisement and made an expression of interest.

8. Having considered this submission, we are of the view that the degree of publicity that may be given to an invitation for tenders or Expression of Interest is a matter which must be left to the discretion of the organization or authority inviting the tenders. The requirement of the law can only be that wide publicity is given so that important contracts are not awarded secretly by public authorities in a manner which would jeopardize the exchequer besides denying an equality of opportunity. The precise degree of publicity is however not a matter which can be prescribed as long as the publicity is real, adequate and does not involve any misrepresentation. In this case, it appears that while the Port Trust did not advertise in the Times of India as in the case of the earlier

tender but chose to advertise in three local newspapers reduction of publicity that may have been caused by not advertising in the Times of India may have been offset by the publicity given on the Website. It may be noted as a matter of common knowledge that Websites are accessible from any of the cities in the country, and even internationally and it cannot be said that it does not amount to wide publicity. Indeed, we are informed that the practice amongst businessmen to look for tenders on Website or Internet has already gained ground and is being used by businessmen regularly. In fact, Mr. S. G. Dessai, the learned Senior Counsel for the Respondent No.3 referred to the affidavit of the third Respondent who has stated that he read the advertisement on the Website.

9. Mr. Nadkarni, the learned Senior Counsel for the Respondent Nos.1 and 2 submitted that the decision of the Respondent No.1 to give publicity to the advertisement is an administrative decision which may not be interfered with. In this regard he relied on the decision of the Supreme Court in **Master Marine Services(P) Ltd. v. Metcalfe & Hodgkinson(P) Ltd. and another**((2005) 6 SCC 138) in which the Supreme Court has made the following observations on the scope of judicial review in such matters:

12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in

administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

14. In *Raunaq International Ltd. v. I.V.R. Construction Ltd.* it was observed that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations, which would include, inter alia, the price at which the party is willing to work, whether the goods or services offered are of the requisite specifications and whether the person tendering is of the ability to deliver the goods or services as per specifications.

15. The law relating to award of contract by the State and public sector corporations was reviewed in *Air India Ltd. v. Cochin International Airport Ltd.* and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere”.

10. In this case, the Petitioner has questioned the process adopted by the Respondent No.1 for arriving at a decision; specifically the method by which the bids are invited. There is no question of the correctness of the administrative decision since none is arrived at.

11. As observed by the Supreme Court, we are of the view that the Respondent-Port Trust was entitled to choose its own method to arrive at a decision and as a part thereof was entitled to decide the manner and extent of the publicity it should give to its advertisement. We are satisfied that the Respondents action has not prevented any particular category of people from coming to know of their intention to lease and the publicity is wide enough to be considered fair.

12. However, Mr. Kakodkar, the learned Senior Counsel for the Petitioner relied on the following decisions of the Supreme Court, ((1993) 2 SCC 279), ((2002) 3 SCC 496), ((2003) 10 SCC 258), ((2004) 8 SCC 671), ((1997) 1 SCC 53), (1988) 4 SCC 534) and ((2006) 8 SCC 399).

13. Having gone through the same, we are of the view that the decisions do not support the Petitioner in this case. In ((1993) 2 SCC 279) and in ((2002) 3 SCC 496) which are both decisions under Section 29 of the State Financial Corporation Act, 1951 where the Supreme Court observed that the sale of public property should be made by calling tenders and every endeavor should be made to give wide publicity and get the maximum price by following a procedure which is transparent and acceptable. We are of the view that in the present case, this requirement is satisfied by the Respondent authority. In ((1997) 1 SCC 53) the Supreme Court emphasized the requirement of openness, transparency and fair dealings in such matters. So also in (2004) 8

SCC 671) the aspect of wide publicity was emphasized. We find that none of the decisions, naturally prescribe the degree of publicity that must be adopted and this aspect must be left to be determined by the Port in each case. We have already expressed our observation that the publicity given by the Respondent-Port Trust in this case was wide and adequate for the purpose of this tender.

14. At this juncture, we must take note of a fact highlighted on behalf of the Respondent-Port Trust. According to Mr. Nadkarni, learned Senior Counsel for the Port Trust, the Petitioner had himself responded to a tender inter alia for a duty free shop pursuant to advertisements which were issued only in the local newspapers i.e. Navhind Times and Gomantak Times, as in the present case. It is in response to this advertisement that the Petitioner has been allotted the duty free shop which he is presently running. According to the Respondent, it therefore does not lie in the mouth of the Respondent to contend that this publicity is not adequate. It appears that today the Petitioner was in a better position to notice the advertisement since he was already running a duty free shop in the premises whereas earlier when he responded to the advertisement which appeared only in the local newspapers when he had apparently no business in Goa.

15. We are therefore satisfied that the advertisement issued by the Respondent has not caused any prejudice generally or particularly to the Petitioner. We may also add that we are of the view that there is no lack of transparency in the procedure adopted for inviting Expression of Interest on the

ground of non publication of the advertisement in the Times of India and also because the Petitioner was not informed that such Expressions of Interest are invited when he was informed that the earlier notice inviting tenders has been discharged. In this view of the matter, we see no merit in the petition which is hereby dismissed.

S. BOBDE, J.

N. A. BRITTO, J.

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